

**General Laws Special Joint Subcommittee  
Studying the Virginia Public Procurement Act  
Work Group 1: Construction and Design Professionals  
September 17, 2014, at 9:30 a.m.  
House Room 1, The Capitol, Richmond  
Meeting Summary**

**Members present:** Anthony Arnold, P.E., Patrick Cushing, Esq. (for Reginald M. Jones, Esq.), Annette Cyphers, Elizabeth Dooley, Mike Halvorson (for Thomas Julian, Jr., P.E.), William H. Hefty, Esq., Tracey Jeter, Bert Jones, Chris Lloyd, Esq., Hunter Merrill, Steve Owens, Richard Sliwoski, Jeff Southard, Chris Stone, P.E., Cecelia Stowe, Steve Vermillion, and Uwe Weindel, P.E.

**Members absent:** Lee Brazzell, Gary Mitchell, and Bernice Travers.

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Work Group 1 of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (VPPA) held its fourth meeting of the 2014 interim on Wednesday, September 17, at 9:30 a.m. in House Room 1 at the Capitol. The meeting began with a review of the actions taken by the General Laws Special Joint Subcommittee on legislation referred by the 2014 session of the General Assembly and a progress report on the activities and consensus items of Work Group 2. After overview and progress report, Julie Whitlock of the Department of General Services (DGS) presented a package of changes sponsored by the. The package, hereinafter referred to as the omnibus draft, includes consensus language as well as suggested provisions to move the work group towards more final consensus in the areas of architectural and engineering services (A/E) term contracts, job order contracting (JOC), and cooperative procurement. Ms. Whitlock provided a brief overview of the changes as follows:

***A/E term contracts***

- Prohibit price-shopping among A/E contractors on term contracts
- Preserve current A/E term limits

***JOC***

- Increase JOC limits from \$2 million per term to \$5 million per term
- Increase JOC limits per project from \$400,000 to \$500,000
- Decrease the number of renewable one-year terms for JOC from four additional terms to two additional terms
- Allow ancillary A/E services up to \$60,000 per order on JOC projects

***Cooperative Procurement:***

- Make no changes to joint purchasing authority
- Continue with the prohibition against allowing the purchase of A/E services under a cooperative procurement contract where the public body was not involved with the initial contract ("piggybacking")
- Expand the prohibition against construction piggybacking to all contracts

In addition, Ms. Whitlock noted that the draft included miscellaneous provisions (i) clarifying that small purchase procedures may be used for construction, provided the Uniform Statewide Building Code is followed, and (ii) raising the limit on the state's ability to procure A/E services non-competitively from \$50,000 to \$60,000 to match the current limit for localities.

After presentation of the package, work group members provided comments. Jeff Southward, Executive Vice President, Virginia Transportation Construction Alliance, asserted that the omnibus draft did not include the exemption for certain transportation projects from JOC or the removal of all construction from cooperative procurement, both of which he believed consensus had been reached. It was agreed that the exemption for transportation projects was a consensus item. Chris Lloyd, McGuire Woods Consulting, asked if the joint procurement provision under cooperative procurement also applied to localities. Rich Sliwoski, Director, DGS, stated that it was the intent of the agency to pursue separate legislation regarding its statewide contract authority. The inclusion of localities, added Sliwoski, depended on the level of resistance. Steve Vermillion, CEO, Associated General Contractors of Virginia, stated that he did not support allowing localities to use statewide contracts for localities as suggested by Mr. Lloyd. Mr. Lloyd also noted that there was a need to include a provision in the bill to cover contracts that were entered into prior to the effective date of the amendments. Uwe Weindel, P. E., Director, Frederick County Sanitation Authority, asserted that while he agreed that under cooperative procurement it was fine to prohibit new construction, the prohibition of all construction would not meet the needs of many water authorities and other utilities. Mr. Vermillion stated that the DGS omnibus draft was a good package to work from but key component missing from the draft was an independent review board. It would be important, asserted Mr. Vermillion, for the work group to move toward an independent review board that would be available at the beginning of the process and capable of making quick decisions so as not to unduly delay a project.

Patrick Cushing, Williams Mullen, expressed support for the omnibus draft but asserted that there needed to clarify that JOC may not be used to procure A/E services. Mr. Chris Stone, P.E., President of Clark Nexsen Architectural & Engineering, stated that he supported the need for an independent review entity. He also offered a language change under the definition of new capital construction to remove the word "addition." It was noted that the omnibus draft prohibited JOC from being used to procure A/E services alone. Michael Halvorson asserted that JOC should not be used to procure A/E services and that any A/E services should be limited to services that are incidental to the overall contract work. William Hefty, Esq., Hefty & Wiley PC indicated that there was a need to clarify that decisions to procure A/E term contracts cannot be based on price and offered that a remedy would be to add the word "solely." There was disagreement among the work group over this suggested change. Anthony Arnold, P. E., Director of Facilities Planning and Construction, Virginia Beach Public Schools, noted that the process used by his public body for A/E term contract involved the choosing two to three professionals and then equally distributing the work among those individuals based on expertise without any further consideration of price. Mr. Hefty offered the following changes (i) increasing the A/E term contract limits for localities with populations over 200,000 from the current \$5 million to \$10 million, and (ii) prohibit new construction from being procured using cooperative procurement but allow a carve out for public works projects.

It was agreed that the DGS omnibus draft would serve as the vehicle for achieving future consensus. Staff was instructed to make several changes to the draft for final review at the next meeting of the work group.

The work group then proceeded to discuss options for increased enforcement and oversight of the public procurement process. Amigo Wade, Division of Legislation Services, presented several suggested changes aimed at clarifying procurement processes in the areas of (i) the choice by public bodies to use a Notice of Intent to Award or a Notice of Award, (ii) the application of the automatic stay provisions, and (iii) clarification of the administrative process for protest appeals. After discussion on each of the proposals, the consensus of the work group was to not move forward with the proposals. The discussion then centered on developing appropriate oversight to ensure that the procurement process works as intended by the legislature. Mr. Hefty noted that he is not willing to support the notion that the current system did not work. Steve Owens, Senior Assistant Attorney General, stated that an appeals entity did exist in the DGS, but that the entity had been discontinued. He cited that the old board was not frequently used, possibly because vendors feared retaliation, and that the process was costly. Richard Sliwoski, Director, DGS noted that the previous appeal entity was limited to goods and nonprofessional services. Mr. Cushing asserted that there remained a need to have some level of review of some procurement decisions and he stated he could provide data on protests that had been made over the last five years. Elizabeth Dooley, Assistant Purchasing Agent, Arlington County and Cecelia Stowe, Purchasing Director, Henrico County, both asserted that not all of the protests may have involved a violation of the VPPA but rather a misunderstanding of the process. They maintained that there may be a need to move toward mandating education and training. Mr. Vermilion stated that the need for an independent review board was critical and that he would be offering an outline of a proposed independent review entity to accomplish this task.

Mr. Wade noted additional options for discussion including an increased role for the State Comptroller and the State Inspector General and the establishment of an advisory council. No consensus could be reached on an increased role for the State Comptroller and the State Inspector General. Regarding the option to establish an advisory council, Ms. Stowe noted that if the current Freedom of Information Act Council is the intended model it is important to understand that while the Freedom of Information Act covers all public bodies across the state at all levels, the VPPA does not. Mr. Lloyd asserted that thresholds should be considered in determining which procurement disputes would be considered by the advisory council. Mr. Weindel stated that even if an advisory body is the consensus, the work group should not give up on the current process. Mr. Wade stated that at the next meeting proposed language for an advisory entity will be provided for the work group's consideration.

### **Public Comment**

The work group opened the floor to receive public comment.

*Michael Locaby, Esq., County Attorney for Louisa County; Local Government Attorney's Association*

Mr. Locaby stated that many localities have very limited staff and that the current VPPA was already extremely difficult for smaller localities to navigate. He asserted that the work

group should not do anything to make the VPPA more complicated. The focus should be on the original intent of the VPPA and its objective of providing general rules with some flexibility. Regarding oversight, Mr. Locaby asserted there was no need for another level of state bureaucracy.

*Reginald Jones, Williams Mullen*

Mr. Jones stated that he worked on the original VPPA and that the intent was for the process to be open and fair while getting the best use of taxpayer money. He stated that he supported the idea of and VPPA advisory council that would an independent look at the process. He cautioned, however, that it would be critical to keep the entity simple and advisory in nature.

### **Next Meeting**

The next meeting of the work group is scheduled for October 15, 2014 at 9:30 a.m. The meeting adjourned at 12:15 p.m.